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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 416

MAURICE A. HUTCHESON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Maurice A. Hutcheson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, filed on June 27, 1963, affirming denial of two motions filed by the petitioner in the District Court, one to reduce sentence under Rule 35 and the other under Rule 12 (b)(2), F.R. Crim. P., to "vacate the judgment and set aside the sentence * * * and to dismiss the indictment."

Filing of petitioner's motions in the District Court followed affirmance by this Court of petitioner's conviction of contempt of Congress (52 Stat. 942, 2 U.S.C. Sec. 192). *Hutcheson* v. *U. S.*, 369 U.S. 599 (1962), rehearing denied, 370 U.S. 965 (1962).

OPINIONS BELOW

The opinion delivered in the Court of Appeals is as yet unreported. A copy of the opinion is appended to this petition, as Appendix A.

In the District Court, Judge Curran delivered no opinion in denying petitioner's motion under Rule 12 (b)(2), F.R.Crim. P. Judge Pine of that Court, in denying petitioner's motion under Rule 35, F.R. Crim. P., made the oral statement of opinion contained on page 27 of the Joint Appendix and reproduced on page 15, *post*.

JURISDICTION

The jurisdiction of this Court rests on Title 28 U.S.C. Section 1254 (1).

The judgment of the Court of Appeals was filed on June 27, 1963.

A timely petition for rehearing was denied, without opinion, on August 1, 1963.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there is any valid distinction, in substance, by reason of petitioner's omission to file a pretrial motion to dismiss his indictment, between petitioner's case and the 9 other cases pending concurrently in which convictions were reversed by this Court in *Russell* v. *U.S.*, 369 U.S. 749, *Grumman* v. *U.S.*, 370 U.S. 288, *Silber* v. *U.S.*, 370 U.S. 717 and *Hartman* v. *U.S.*, 370 U.S. 801.

2. Whether, where convictions of 10 others have been reversed because of a fundamental and constitutional defect in their respective indictments, petitioner's conviction upon an identically defective indictment must

also be reversed and the indictment dismissed, notwithstanding his omission to file a pre-trial motion to dismiss the indictment, where

(a) such omission is not properly chargeable against petitioner because when he was indicted and tried the indictment was clearly valid under the state of the law as repeatedly held by the District Court and the court below, and as applied by this Court in *Barenblatt* v. *U.S.*, 360 U.S. 109, and petitioner moved to dismiss the indictment as promptly as practicable (and while his case was still pending in the District Court) after this Court changed the state of the law in *Russell*;

(b) the 9 defendants so freed by this Court had been indicted and tried, and filed their pre-trial motions, before this Court's ruling in *Barenblatt*, whereas petitioner's indictment postdated that decision;

(c) 3 of such 9 defendants had, after *Barenblatt*, abandoned their motions to dismiss the indictment, but nevertheless were freed by this Court on the authority of *Russell*.

3. Whether, under Rule 12(b)(2), F.R.Crim.P., the District Court had jurisdiction to entertain and grant petitioner's motion to vacate the judgment and dismiss the indictment after affirmance of petitioner's conviction but before his commitment under the judgment.

4. Whether this Court's denial of petitioner's petition to this Court for rehearing was intended to preclude petitioner from the remedies against invalid indictments afforded by Rule 12(b)(2), F.R.Crim.P.

5. Whether the District Court lost jurisdiction to rule on petitioner's motion to reduce his sentence under

Rule 35, F.R.Crim.P., because, although the motion was timely filed, the District Court failed to hear and determine the motion within 60 days after the mandate of affirmance of petitioner's conviction was received by the District Court.

6. Whether, in the circumstances of this case, the District Court, in ruling upon petitioner's motion to reduce sentence, should have weighed the circumstances in respect of petitioner's position relative to the other 10 who were freed, as a mitigating factor in exercising its discretion with respect to petitioner's sentence.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments provide:

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI].

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2 U.S.C. Sec. 192 provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2 U.S.C. Sec. 194 provides:

"Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either Houes of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House,

it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

Rule 12(b)(2), Federal Rules of Criminal Procedure, provides so far as pertinent:

"Rule 12. Pleadings and Motions before Trial; Defenses and Objections

* * * * *

"(b) The Motion Raising Defenses and Objections.

* * * * *

"(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Rule 35, Federal Rules of Criminal Procedure, provides:

"Rule 35. Correction or Reduction of Sentence.

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within

60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

STATEMENT OF THE CASE

On February 15, 1960, petitioner was indicted on a charge of violating 2 U.S.C. § 192 (Contempt of Congress). He waived a jury trial, was found guilty by the District Court (the late Morris, J.) and on May 13, 1960 was sentenced to six months imprisonment and fined $500. The court below having affirmed the conviction on December 7, 1960 (No. 15,906), this Court granted certiorari, and the case was argued on November 6, 1961. This Court (by vote of 4 to 2) affirmed the conviction on May 14, 1962.[1] Petition for rehearing was denied on June 25, 1962. 370 U.S. 965.

On May 21, 1962, one week after petitioner's conviction was affirmed, *six* other defendants' convictions for the same offense were reversed by this Court, 369 U.S. 749 (1962), *sub nom*: *Russell* v. *United States*, on the ground that their several indictments were fatally defective because each failed to identify the subject under Congressional committee inquiry at the time the witness was interrogated. Thereafter, three

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[1] 369 U.S. 599. Harlan, Clark and Stewart, JJ., joined in an opinion for affirmance; Brennan, J., concurred in their result but not in their opinion, and filed a separate opinion; the Chief Justice and Douglas, J., dissented. Black, Frankfurter and Whittaker, JJ., did not participate. As only three Justices (less than a majority) agreed, the result was like that referred to in *U.S.* v. *Pink*, 315 U.S. 203, where the Court said: "The lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases."

more convictions were reversed by this Court for the same reason, in *Grumman* v. *U.S.*, 370 U.S. 288, *Silber* v. *U.S.*, 370 U.S. 717, and *Hartman* v. *U.S.*, 370 U.S. 801, a total of *nine* defendants freed by order of this Court because their indictments were defective. The Court below freed a *tenth* defendant for the same reason in *Popper* v. *U.S.*, 306 F. 2(d) 290, 113 U.S. App. D.C. 130 (1962).

The indictment of petitioner has the identical defect, and the government so concedes (26).[2] However, petitioner had not raised the point by motion to dismiss the indictment in the District Court.[3]

The omission of the petitioner to raise the point prior to this Court's decision in *Russell* occurred in the following factual context:

Until *Russell*, the court below had repeatedly held the form of indictment here employed to be sufficient in law. Such was the state of the law when petitioner was indicted and tried. More important, petitioner was indicted *after* this Court, in a decision handed down in the *Barenblatt* case had, as shown below, given most striking indication of acquiescence in the long-standing rulings of the courts below; whereas the nine freed in *Russell, Grumman, Silber* and *Hartman*, had been indicted and raised the point in the District Court *before* this Court decided *Barenblatt*.

A review of cases in the courts below and this Court prior to this Court's decision in the *Russell* cases demonstrates these facts in detail.

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[2] The numerals are, unless otherwise indicated, page numbers in the Joint Appendix constituting the record as printed for the use of the court below.

[3] Petitioner ought to raise the point in this Court after *Russell* by petition for rehearing, as to which see, *post*, pp. 35 to 39.

In 1948 a panel of the court below first upheld the validity of an indictment under Title 2, U.S.C. Sec. 192, which failed to specify the question under inquiry. *Eisler* v. *United States*, 170 F. 2d 273, *certiorari* dismissed, 338 U.S. 883.

In 1957, the question was raised anew and again the indictment was held sufficient by a new panel of three judges of the court below in *Barenblatt* v. *United States*, 240 F. 2d 875. The court below cited and followed *United States* v. *Josephson*, 165 F. 2d 82, *cert. den.* 1948, 333 U.S. 838, which had been decided by the United States Court of Appeals for the Second Circuit in 1947.

The following year (1958) the court below, sitting *en banc*, upheld the indictment against the claim that it was "constitutionally insufficient". *Sacher* v. *United States*, 252 F. 2d 828. The court said on this point: "In our view nothing said or implied in the *Watkins* opinion (*Watkins* v. *United States*, 374 U.S. 178) suggests the (Supreme) Court intended to interpret Rule 7c Fed. R.C.P., 18 U.S.C.A., to require that an indictment under 2 U.S.C.A., Sec. 192 recite details of the authority and scope of the inquiry. We see no reason to alter our prior holding that the indictment was sufficient."

Earlier in that same year (1958) the court below, also sitting *en banc*, had reconsidered and reaffirmed the 1957 decision of the panel which had affirmed the conviction of Barenblatt. *Barenblatt* v. *United States*, 252 F. 2d 129 (1958). This came about when that case was remanded to the court below by this Court for further review in the light of this Court's decision in *Watkins*, *supra*. In reaffirming Barenblatt's convic-

viction the court below made reference, but without discussion (p. 131), to the question of the sufficiency of the indictment, which (as shown) it upheld in the earlier opinion; and the court stated that it had reconsidered matters covered by the prior opinion and that: "We think such other matters are sufficiently answered by the original opinion of this Court, which, by reference for present purposes, is incorporated herein."

Barenblatt's conviction was affirmed by this Court on June 8, 1959, in 360 U.S. 109. This Court explains this affirmance in the majority opinion in *Russell* by stating (369 U.S. at p. 754, n. 7): "although the question was decided by the lower court in *Barenblatt* v. *United States*, 240 F. (2d) 875, it was not raised in this Court, 360 U.S. 109."

But this statement *is in error.* It overlooks the fact that Barenblatt raised the question in this Court on his first petition for certiorari, and the government joined issue thereon. See Vol. 158, Supreme Court, U.S., "Transcripts of Records and Briefs," 1956, Case No. 742, Petition for Certiorari, page 2; Brief for the United States in Opposition, pages 14-6. This Court brushed the point aside, but granted certiorari and concurrently remanded the case to the Court of Appeals for reconsideration *on the merits* in the light of the *Watkins* case, *supra*, which turned upon questions not involving the sufficiency of the indictment. 354 U.S. 930.

In 1960, on at least three separate occasions, a panel of the court below held the indictment sufficient. *Shelton* v. *United States*, 280 F. 2d 701 (1960); *Liveright* v. *United States*, 280 F. 2d 708 (1960); and *Price* v. *United States*, 280 F. 2d 715. In *Shelton* the court

below said: "No authority has been cited to suggest that Rule 7c Fed. R.C.P., 18 U.S.C.A., requires an indictment under the statute to recite details of the authority and scope of inquiry"; and that: "*Sacher* v. *United States*, (1958), 102 U.S. App. D.C. 264, 267, 252 F. 2d 828, 831, held that an indictment under the statute need not 'recite details of authority and scope of the inquiry', and that holding stands undisturbed by the Supreme Court's action in *Sacher* v. *United States*, (1958) 356 U.S. 576, 78 S. Ct. 842, 2 L. ed. 2nd 987."

It is seen, therefore, that this Court's "sudden" (per Harlan, J.,) decision in the *Russell* cases in fact and intent changed the state of the law long after petitioner was indicted and tried. This Court, both in *Sacher* and in *Barenblatt*, had had the opportunity to reconsider the issue, which was raised on the record at the threshold of the cases, but had done or said nothing to foreshadow the decision in *Russell*. And in fact, although Sacher's conviction was reversed on other grounds, which need not have been reached if the indictment was invalid, Barenblatt's was finally affirmed *and he was jailed*, just 8 months before appellant's indictment and trial: On November 19, 1959, Barenblatt was denied a reduction of his sentence, and he was remanded to the District of Columbia jail.

Petitioner's indictment, filed February 15, 1960, was the last of the 36 found in the District of Columbia under the state of the law as it existed prior to *Russell*. It was found only a short time *after* this Court had affirmed *Barenblatt*; and *after* that case had been twice before the court below, which twice (once by a panel and once *en banc*) had rejected his attack on the sufficiency of the indictment.

On the other hand the six defendants whose convictions were reversed *sub nom. Russell* (i.e., Russell, Shelton, Liveright, Whitman, Price and Gojack) and who had filed pre-trial motions to dismiss their respective indictments, were indicted and tried, and made their pre-trial motions, long before this Court's decision in *Barenblatt;* and in fact, by order of the court below dated May 7, 1958, hearing of five of these cases, then pending below, was "deferred until after the decision of the Supreme Court in the Barenblatt case", because they "involve, principally, questions the same as or similar to the questions involved in * * * *Barenblatt* v. *United States*." See *Gojack* v. *United States*, 280 F. 2d 678, 680, n. 2.

The convictions of Grumman, Silber and Hartman were reversed here following *Russell*, and while petitioner's case was here, before it was remanded to the District Court. Each of these 3 defendants, like the 6 in *Russell*, had been indicted and tried, and filed his pre-trial motion, before *Barenblatt*. Hartman's motion was filed on May 21, 1958; Grumman and Silber each filed on September 16, 1958. Hartman's motion was denied on June 17, 1959, and (as will be shown) he did not appeal the denial. *U.S.* v. *Hartman*, Criminal #36099, U.S. Dist. Ct. for Nor. Dist. of Calif. Sou. Div.; and *Hartman* v. *U.S.*, 290 F. 2d 460. Grumman and Silber, (as will be shown) voluntarily abandoned their attack on their indictments when, after *Barenblatt*, their motions were set down for hearing. See *post*, p. 20-1.

Of the 10 whose convictions were reversed, only *Popper* (whose conviction was reversed by the court below, following *Russell*) made the motion *after* this

Court's ruling in *Barenblatt*; and that motion was perfunctory and was denied on the authority of this Court's decision in *Barenblatt*, the District Court (McGarraghy, J.) briefly noting: "The indictment states facts sufficient to constitute an offense and is sufficient against a motion to dismiss. (*Barenblatt* v. *U.S.*, 360 U.S. 109)". *U.S.* v. *Popper*, Crim. No. 1053-59, U. S. Dist. Ct. for D.C.

To meet the unexpected situation created by this Court's decisions in *Russell*, *Grumman*, *Silber* and *Hartman*, petitioner promptly filed two motions in the District Court, one (a motion under Rule 12(b)(2), F.R.Crim.P.) to be relieved of his conviction under the defective indictment (5-6), and the other (a motion to reduce sentence under Rule 35, F.R. Crim. P.), to avoid being jailed under circumstances identical in substance to those in which nine other defendants convicted under earlier indictments had been freed (4-5).

Both motions were brought to Judge Curran's attention on July 19, 1962, upon the presentation in the District Court of the certified copy of the judgment of affirmance. Judge Curran, thereupon, without objection by government counsel, entered the following order (8-9):

> "This cause coming on further to be heard this day upon the presentation in open court of the mandate or judgment of the Court of Appeals affirming the Judgment entered herein on May 13, 1960; and the said defendant having appeared in person and being represented by his counsel, and the United States being represented by an Assistant United States Attorney; and it being shown to the Court that there have been filed and are pending herein (1) a motion to vacate the said

judgment, to set aside the sentence, and to dismiss the indictment, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and (2) an alternative Motion for reduction of sentence pursuant to Rule 35 of the said Rules, which motions are set down for argument before this Court on July 20, 1962; and counsel for the defendant having moved for a stay of the commitment of the said defendant under and pursuant to the said Judgment entered May 13, 1960, pending the hearing, determination or disposition of the aforesaid motions, and no objection having been made, it is this 19th day of July, 1962.

"ORDERED, that commitment of the defendant Maurice A. Hutcheson under and pursuant to the judgment entered herein on May 13, 1960, be and the same is hereby stayed until the aforesaid motions are heard, determined or disposed of; . . ."

On the following day (July 20), counsel appeared before Judge Curran prepared to argue both motions, if necessary. Judge Curran first heard argument on the motion under Rule 12(b)(2) and, at its conclusion, made the following announcement (16):

"'The Court: I will take under advisement the defendant's motion to vacate judgment and set aside the sentence, and dismiss the indictment. * * *

"If my ruling is in favor of the motion, that ends it as far as this Court is concerned. If it is against the motion, then I will hear you on the question of the reduction of sentence.'"

On January 10, 1963, almost 6 months later, the District Court, without opinion, denied the motion to vacate judgment, etc. (16). The alternative motion under Rule 35 yet remained to be disposed of (see

notation in Docket Entries (vi)), pending which the judgment and commitment was stayed. The alternative motion was heard and denied by the Court (Pine, J.) on February 1, 1963; and upon its denial petitioner promptly (and within 10 days) filed notice of appeal from the disposition of both motions (29).

When the motion under Criminal Rule 35 came on for hearing before the District Court on February 1, 1963, the government contended the District Court had lost jurisdiction to rule on it, because, although the motion was admittedly filed on time, the Court had not acted upon it within 60 days after July 19, 1962, which the government contended (and petitioner denied) was a requirement under Rule 35, F.R. Crim. P. This contention was argued before Judge Pine and he overruled it.

In denying petitioner's motion, Judge Pine stated (27):

> "My opinion at this time is it would be incorrect to make any change whatever in the sentence because if what you (defendant's counsel) say is correct, the defendant has been unfairly treated. And if he has been unfairly treated, the conviction should be reversed; but if what you say is incorrect, then I don't think that is any ground for reducing the sentence because, then, the whole basis for your claim goes out except for this suggestion that he is now willing to go before the Committee.[4] I do not think that is very convincing when the Committee has ceased to exist.
>
> * * * * *

[4] Petitioner informed the District Court of his willingness to purge himself of contempt if given a suspended jail sentence and placed on conditional probation (17-8).

"Have the order show that I disagree with the Government's position that the motion was not timely filed; I think it was, and that the delay in decision is not something that can be charged against the defendant. On the merits, under the circumstances, I do not think it is a case where there should be any change in the sentence."

Curran, J., and Pine, J., although denying petitioner's motions, recognized that a substantial question had been raised. Pine, J., said so expressly. In ruling on petitioner's request for bond on appeal, he said: "I think there are substantial questions here. Unless the government objects, I will certainly enlarge him (the defendant) on bond pending appeal." (28). The government objected, whereupon the court instructed petitioner to apply for bail first to Judge Curran, saying: "then you can come back to me. My disposition would be to enlarge him on bail pending appeal because I think there is a substantial question." (28-9). Later, addressing himself to government counsel, Judge Pine stated, "It seems to me that in view of what he (defendant's counsel) says and *what you admit*, there ought to be an opportunity for the Supreme Court to pass on the question *so there will be equal treatment for all*". (Tr. 2, p. 40, l.18).[5] (Emphasis supplied).

Upon application to Judge Curran for bond on appeal, he admitted the petitioner to bail forthwith, and reduced the amount of bond from $1,000 to $500. At the hearing on July 20, he had stated (13): "I am very much concerned that nine other men go free, and

[5] The Transcript reference is as follows: "Tr. 2", refers to the stenographic transcript by Reporter Sanché, of the hearing before Judge Pine on February 1, 1963.

this man goes to jail. I don't know what decision I am going to make, but I don't see that they (the defendant) are precluded now, *if the indictment is an invalid one and it is similar to other cases that the Supreme Court has decided to be invalid*, why they are precluded from raising it now. I am much concerned that nine others are released and this man isn't * * *". (Emphasis supplied). At the later hearing Judge Pine put Judge Curran's "if" directly to government counsel and received an unequivocal answer (26): "The Court. Let me ask you a question. (Defendant's counsel) has made the statement that the indictment in this case is practically identical with indictments which were held a week after the decision in this case to be defective. Do you agree with that? Mr. Hitz. *I do. That is precisely the situation.*" (Emphasis supplied).

REASONS FOR GRANTING WRIT

1. The rulings of the courts below are in conflict with the decisions of this Court in *Russell, Grumman, Silber* and *Hartman*.

2. The question of the jurisdiction of the District Court to entertain and grant a post-affirmance motion to dismiss petitioner's indictment under Rule 12(b)(2), F.R.Crim. P., presents an important question of federal law which has not been but should be settled by this Court.

3. The ruling by the court below that this Court has already passed on the contentions argued by petitioner in his District Court motion under Rule 12(b)(2) is erroneous and in conflict with this Court's rulings in *Russell, Grumman, Silber* and *Hartman*.

4. The question as to whether petitioner lost the benefit of his timely motion to reduce his sentence

under Rule 35 because of the District Court's delay in hearing and deciding same involves an important question of federal law which has not been but which should be settled by this Court.

5. Failing any other remedy, in view of this Court's ruling, in *Russell*, and related cases, the District Court was in error in refusing to weigh the inequality of petitioner's treatment in relation to the other 10 who were freed, in mitigation of his prior sentence.

Hence, we respectfully submit that the present case plainly satisfies the criteria for certiorari established by this Court's Rule 19.

AMPLIFYING ARGUMENT

POINT I

This Case Is Indistinguishable in Substance From Cases in Which This Court and the Court Below Freed Ten Others.

1. As previously shown, one week after this Court's affirmance of petitioner's conviction six other defendants' convictions for the same offense were reversed by this Court, because of fatal invalidity of the indictment. *Russell* v. *U.S. supra.* Subsequently three more convictions were reversed by this Court for the same reason, in *Grumman* v. *U.S., supra, Silber* v. *U.S., supra,* and *Hartman* v. *U.S., supra.*; The Court below freed a tenth defendant for the same reason in *Popper* v. *U.S., supra.*

The indictment of defendant has the identical defect, and the government so concedes.

We say that in the interests of justice in criminal cases no defendant should be jailed on a conviction on an indictment that is fatally defective and invalid and on which ten others have gone free. This is the ultimate issue in this case.

The critical fact, which did not exist when this Court denied petitioner's petition for rehearing, but does now, is this: *At that time, counsel for petitioner had not moved in the District Court for dismissal of the indictment because it failed to set forth the question under inquiry, hence the District Court had not denied such a motion, and there was no error in the record; but now such motion has been made and denied. This case and the other ten are now indistinguishable.*

To distinguish petitioner's case from the other ten because of the omission to file a pre-trial motion in the present circumstances would be grossly unfair. It would be grossly unfair, also, to treat Russell, Shelton, Liveright, Price, Gojack, Whitman, Grumman, Silber, Hartman and Popper in one way and Hutcheson in another. To do so would exalt form over substance, and instance an anachronistic return to the so-called "sporting" attitude toward the administration of criminal justice, which regarded the law as a game of wits, and the defendant as the pawn in the game.

As we have shown (supra, p. 12), the six freed by this Court in Russell were indicted, and filed their motions, prior to the jailing of Barenblatt, whose conviction was affirmed here, despite the fact that he had raised the very point in the District Court, *twice* in the Court of Appeals, and also in this Court. Grumman Silber, and Hartman, the other three freed by this Court, had likewise been indicted and had filed their motions *before* Barenblatt was jailed. Petitioner was indicted thereafter.

Grumman was freed by this Court while petition for rehearing was pending here in petitioner's case; and Silber and Hartman were freed *on the very day* on which that petition was denied. And yet examination

of the District Court files in the two cases first-mentioned, (Criminal Nos. 752-58, and 753-58, U.S. Dist. Ct. for D.C.) reveals the striking fact that, *after Barenblatt, each of these defendants had abandoned his motion to dismiss the indictment.* These motions had been pending without hearing or determination until after this Court's affirmance of Barenblatt's conviction. Thereafter, when the motions were heard, *each of these defendants agreed that the motion should be treated instead as a motion to strike specific counts of the respective indictments,* the motion for dismissal being in effect withdrawn as to the remaining count or counts. Thus, in *Grumman*, Judge Letts entered the following order on the motion, on January 29, 1960:

> "At the hearing January 18, 1960, defendant's motion to dismiss the indictment was by agreement of counsel to be treated as a motion to strike counts 1, 2 and 4. Defendant's motion to dismiss the indictment being so treated *is sustained* and accordingly the Court strikes counts 1, 2 and 4 of the indictment."

On the same day (January 29, 1960), Judge Letts entered an order *in haec verba* in the *Silber* case, striking count 2 of that indictment. These orders left intact the indictments as to the remaining counts, on which the defendants were tried and convicted. This Court reversed the convictions on the authority of *Russell.*

It needs no argument to demonstrate that the motions to dismiss the indictments for failure of the grand jury to charge the subject of inquiry were abandoned when the defendants agreed that they should be treated merely as motions to strike specified counts. (Each count was a separate question propounded to the wit-

ness by the Congressional Committee, and which the witness allegedly refused to answer.) Moreover, the motions in *Grumman* and *Silber*, as thus changed, were *sustained*, not denied.[6] *Hence, this Court's statements in Silber, as to the District Court's disposition of this motion, are in error.*

This Court's opinion in *Silber* (who admittedly did not raise the point in the Court of Appeals or in this Court)[7] makes it appear that any possible justification for jailing petitioner whereas 9 others were freed hangs on one thing, and one thing alone, petitioner's omission to make a pre-trial objection to the indictment. But it now appears there is no substance whatever to that supposed distinction between *Silber's* case and petitioner's, or between *Grumman's* case and petitioner's.

As for Hartman, he too voluntarily abandoned his motion, in the Court of Appeals and in his petition for certiorari. He raised the question in this Court for the first time *after Russell*, by a motion to supplement his petition for certiorari (copy of which is set forth in Appendix B, *post*). The motion was granted and his conviction was reversed on June 25, 1962, on the authority of *Russell and Silber*. *Hartman* v. *U.S.*, *supra*.

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[6] The Government, in fact, appealed from Judge Lett's two orders of January 29, 1960, sustaining the motions (as modified), to strike specified counts of the two indictments, but after the defendants were convicted on the unstricken counts the appeals were dismissed by agreement of counsel for the respective parties. (See District Court files in Criminal Nos. 752-58 and 753-58).

[7] In its *per curiam* opinion, the Court below gives stress to the statement that in the case of each of the six freed in *Russell*, the defendant re-urged his pretrial objections before the Court of Appeals and this Court. See Appendix A. Ignored is the fact that Silber did *not* do so, as this Court points out in its opinion in his case. The reason he did not is now apparent.

To jail petitioner *after Russell* because, *after Barenblatt*, he did not file a pre-trial motion should, we think, in the light of the facts be a matter of sufficient gravity to trouble the conscience of the Court.

POINT II

Petitioner's Motion Under Rule 12(b)(2), F.R. Crim. P., Was An Appropriate Remedy and Available to the Petitioner in the Circumstances of This Case Despite Prior Affirmance of His Conviction By This Court; and the District Court Had Jurisdiction to Entertain Such Motion and Was Bound to Grant It Under the Authority of Russell.

Petitioner's post-affirmance motion under Rule 12 (b)(2) was not untimely. The Rule sets up no hard and fast time limits. The jurisdiction of the District Court in the premises is plenary, and as broad in point of time of its exercise as the interests of justice require.

In this case petitioner filed his motion in the District Court as soon as that Court resumed jurisdiction of his case, following affirmance. This was the first opportunity the petitioner had to make his motion, following this Court's change in the state of the law in *Russell*. The motion thus filed was timely under Rule 12 (b)(2), as we will demonstrate:

1. Petitioner contends that the remedy of a motion under Rule 12(b)(2) is available even after affirmance; and that it may be invoked and must be entertained and granted in a case such as this, where there is a supervening change in the state of the law (following affirmance of a conviction and before commitment of the defendant to jail), upon an issue which encroaches upon the defendant's fundamental or constitutional rights.

This question is a key one in this case because, as we will show, availability to petitioner of this remedy in the District Court, which petitioner had not exhausted, undoubtedly furnishes the rationale for this Court's

denial of rehearing in petitioner's case, on the very same day on which it reversed Silber's and Hartman's convictions.[8]

It is a tribute to the foresight of the draftsmen of Rule 12(b)(2) that they couched its provisions in terms broad enough to render it available in the unusual circumstances which are presented by the present case.

The pertinent provisions of Rule 12(b)(2) are: (a) a mandatory provision that the Court *must* dismiss an indictment at *any time during the pendency of the case* for failure to charge an offense; and (b) a permissive provision under which the Court may entertain a motion to dismiss an indictment after the time usually permitted for raising such defense or objection "for cause shown." It will be noted that (a) is an express provision which negatives any time limitation (other than pendency of the case) upon the availability of the remedy in the District Court; and (b) contains no express time limitation.

We think the reasonableness of the position that a motion under Rule 12(b)(2) may be filed and entertained after affirmance and prior to commitment can be tested and demonstrated conclusively by considering its application to the following assumed state of facts:

Assume that petitioner *had* filed a motion in the District Court, prior to trial, for dismissal of the indictment because it failed to allege the subject matter of inquiry, and that following his conviction he appealed to the court below solely upon the ground that denial of the pre-trial motion was reversible error. Assume

[8] See Point III, *post*, p. 35.

further that appellant's conviction was affirmed below in reliance on the state of the law prior to *Russell;* that petitioner had not sought review by this Court; and that the mandate of affirmance by the court below happened to be presented to the District Court on May 22, 1962, one day after this Court handed down its decision in *Russell,* wherein it had suddenly changed the state of the law upon which affirmance of the conviction had been based.[9]

Assume, finally, as is the fact, that upon the presentation of the mandate in District Court, appellant had made a motion to vacate the judgment and to dismiss the indictment, under Rule 12(b)(2) of the Criminal Rules, upon the basis of the supervening decision in *Russell.*

Under the theory advanced by the government in the courts below (but not adopted by the Court of Appeals) the District Court would have been com-

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[9] The government in the courts below did not controvert the fact that *Russell* changed the state of the law in this respect. In fact, the government, in a recent memorandum filed in the District Court in *U.S.* v. *Russell,* Criminal No. 820-62, in answer to defense motions addressed to the second indictment which followed reversal of Russell's conviction, states: "This indictment form * * * was approved as sufficient by this Court of Appeals in the first case in which it was used (*Eisler* v. *United States,* 170 F. (2d) 273 (1948), cert. dismissed 338 U.S. 883) and has been upheld against all attacks until struck down by the Supreme Court for failure to allege subject matter. The use and approval of that indictment form is pointed out by the Supreme Court in *Russell* in footnote 7 of its opinion. To the cases there referred to may be added: *Shelton* v. *United States,* 280 F. (2d) 701; *Liveright* v. *United States,* 280 F. (2d) 708 and *Price* v. *United States,* 280 F. (2d) 715, all reversed, 369 U.S. 749." Addition of the *Eisler* indictment and the 6 held invalid in *Russell* to the 29 listed in Mr. Justice Harlan's dissenting opinion in Russell (p. 782) brings the total to 36, of which petitioner's is the last.

pelled to deny the motion for lack of jurisdiction. Its position was that there is no legal remedy which a wrongly convicted defendant could invoke, at least *until he is jailed.*

If that were right, then an appeal from denial of the motion would likewise provide no remedy, because, if the District Court had no jurisdiction, its denial of the motion could not be error. Hence, even on a state of facts *indisputably* the same as in the other ten cases, *the appellant must nevertheless be committed to jail.*

Once jailed, the government apparently was willing to concede legal remedies might be available either under Title 28, U.S.C., § 2255 or by habeas corpus (Brief for Appellee, p. 7, footnote 5). It would be incongruous to compel an individual whose case was still before the District Court, who had not been committed, who was still under the Court's jurisdiction and subject to its control, to go to jail in order to be able to invoke a legal process to vindicate his right to freedom.

This unreasonable result, if compelled by the Criminal Rules, would prevent the District Court in these circumstances from applying, with equal justice, the law as interpreted and expounded by the Supreme Court. Such a material gap in the rules obviously would call for their prompt amendment.

Fortunately, however, there is no such gap in the Criminal Rules; as we have shown, for neither the language of Rule 12(b)(2), nor any judicial precedent cited by either side in the courts below, nor reason, compel the construction for which the government contended.

2. The rationale of *Russell* is that lack of a statement of the specific subject of inquiry is an omission of an essential fact necessary to charge an offense. This is made crystal clear in that part of the majority opinion holding the omission could not be cured by a bill of particulars, by the prosecution, or by the court itself, but only by the grand jury on resubmission of the case, 369 U.S. at pp. 769-70. It is significant, too, that cases upon which this Court relied in so holding involved indictments that failed to charge an offense. See, e.g., *U.S.* v. *Cruikshank*, 92 U.S. 542; *Babb* v. *U.S.*, 218 F. 2d 538; *Steiner* v. *U.S.*, 229 F. (2d) 745.

On the retrial of Shelton (*U.S.* v. *Shelton*, Crim. No. 825-62), one of the defendants whose conviction was reversed in *Russell*, the District Court treated the allegation as to subject matter of inquiry in the second indictment as one of material *fact*, and specifically found that the "Government proved beyond a reasonable doubt what the question under inquiry by the Committe was." See Memorandum of Leonard P. Walsh, J., filed February 15, 1963.

Before *Russell*, the identification of the subject matter was considered a question of law. No case has been found in which the jury was asked to determine the subject matter under inquiry by the Committee. The Court's jury charge in *Russell* (on the first trial), for example, described subject matter as a *question* of law to be determined by the trial judge. Record, p. 156, *Russell* v. *U.S.*, *supra*. The majority opinion in *Russell* establishes that subject matter is a question of fact, see e.g., 369 U.S. at 770. Judge Walsh, therefore, correctly construed *Russell* in treating the issue as he did in the second trial of Shelton. This change

in the state of the law as to the respective functions of the trial court and jury clearly has an important bearing on the matter of a waiver of a jury trial. Petition, in the light of the state of the law before *Russell*, waived a jury trial, an election he would not otherwise have made.

Clearly, therefore, the indictment fails to charge a fact which is an essential element of the crime which the law requires be found and charged by the grand jury, and it alone. In *Hartman's* case, this was his sole contention. See Appendix B, *post*, pp. 4a-7a. Hence, the petitioner's motion in the District Court was within the ambit of the mandatory provision of Rule 12(b)(2).

The holdings in *Russell* that the invalidity of the indictment is incurable and that the sole recourse of the prosecution is resubmission of the case to the grand jury can be rationalized only on the basis that the faulty indictment omits an essential element of the crime and hence fails to charge an offense.

The mandatory provision of Rule 12(b)(2) applies for the further reason that appellant's conviction under the invalid indictment constitutes a deprivation of his constitutional rights under the Fifth and Sixth Amendments. This is made clear by the majority opinion of this Court in *Russell* which said (369 U.S. at pp. 760-761):

> "We need not pause to consider whether an offense under 2 U.S.C. § 192 is an 'infamous crime', *Duke* v. *United States*, 301 U.S. 492, since Congress from the beginning explicitly conferred upon those prosecuted under the statute the protection which the Fifth Amendment confers by providing that no one can be prosecuted for this

> offense except upon an indictment by a grand jury. This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that 'In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .'"

As we read the majority opinion in *Russell*, it is based upon broad principles of constitutional law applicable to every citizen who may be called as a witness before a congressional committee, and is not tailored to fit only cases arising from the House Un-American Activities or Senate Internal Security Committees.

This Court's ruling in *Russell* did not simply establish a new rule of practice as to criminal pleading. It enlarged the function of the grand jury, and also, as we have shown, changed the distribution of functions as between court and jury, in prosecutions for contempt of Congress. This is perceived in a commentary on *Russell* in 76 Harv. L. Rev. (1962) at p. 100, where the author states: "The Court, in an opinion by Mr. Justice Stewart, reasoned that the statute's requirement of an indictment evidenced an intent to invoke the purposes served by the constitutional requirement of a full grand jury indictment in ordinary federal criminal cases: to give the accused fair warning of the charge he must meet at trial, *and to insure that no defendant will be compelled to stand trial except upon the grand jury's statement of the elements of the offense.*" (Emphasis supplied). As the Court stated (369 U.S. at 770), an indictment phrased merely in the statutory language permits a conviction "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Clearly therefore, the vice in the indictment is failure to charge an offense, since the omission was found by the Court to be an essential factual element of the offense, which constitutionally must be found and charged only by the grand jury itself. Petitioner has thus been prejudiced not only by loss of his right to a jury trial, but also of his right to an indictment by a grand jury.

In the commentary referred to above the author further states (76 Harv. L. Rev. at 103):

> "The strongest argument advanced by the dissenters (*in Russell*) was that the defendant could have secured, through a bill of particulars, a statement of the Government's contentions as to subject matter, and that for this reason the indictment should not have been found invalid. A bill of particulars might provide adequate warning of the issues at trial and would prevent variance between the trial and appellate court theories; *but it would not answer the Court's concern for the full applicability of the safeguards against hasty prosecutions provided by the requirement of a grand jury indictment.*" (Emphasis supplied).

Bearing out the petitioner's contention as to this point, and the above quoted commentary, is this Court's statement in *Russell*, 369 U.S. at p. 770 as follows:

> "When Congress provided that no one could be prosecuted under 2 U.S.C. § 192, except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make this ultimate determination, must necessarily determine what the

> question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.'"

Hence this Court held that the indictment could only be cured of its constitutional invalidity by resubmission to the grand jury. In these circumstances, the mandatory provision of Rule 12(b)(2) clearly applies. See *Hartman* v. *U.S.*, *supra*.

3. Under the "permissive" provision of Rule 12(b)(2), the District Court is authorized "for cause shown" to relieve a defendant of the "waiver" implied from failure to move to dismiss an indictment before trial. The rule contains no express time limit, and a reasonable construction would make it co-extensive with the mandatory provision which applies at any time during the pendency of the case.

At the hearing on the motion in the District Court, petitioner's counsel urged this aspect of the rule,[10] and the Court made significant comment on the matter of "waiver", as follows (12, 13):

> "MR. TUMULTY: * * * the second aspect of Rule 12(b)(2) that Your Honor will have to consider is this: Rule 12(b)(2) deals with the time for raising objections by motion, objections to indict-

[10] Petitioner, as shown *post*, pp. 35-6, did not urge the "permissive" provision of Criminal Rule 12(b)(2) upon this Court in his petition for rehearing, as such provision plainly calls for the filing of a motion in the District Court, together with a showing of "good cause" for relief from the "waiver" implied from the failure to file the motion before trial.

ments and other types of objections, and it provides, in effect, that in cases of motions addressed to the indictment, other than motions of the type that I have indicated to Your Honor where the motion can be made at any time during the pendency of the case, the motion should be made before trial. But under this rule that provision is not jurisdictional because the rule says:

"'Failure to present any such defense or objection, as herein provided, constitutes a waiver thereof, *but the Court, for cause shown, may grant relief from the waiver*'.

"It is being contended here that we waived because this motion wasn't made before trial.

"THE COURT: *I am not convinced of that argument.*

"MR. TUMULTY: Your Honor?

"THE COURT: *I am not convinced of the Government's argument on that aspect.*

"MR. TUMULTY: I can say this to your Honor: that it was not waived; it was never waived. We relied on decisions of this Court and on decisions of the Court of Appeals of this Circuit, the Second Circuit, and the Fifth Circuit, which said that this type of indictment was perfectly good, and 26(sic) convictions were obtained on identical indictments to this. And the matter had been pending before the Supreme Court on questions raised on the validity of this indictment and the Supreme Court never noticed it until after our case was decided.

"So, Your Honor, we say there is good cause for permitting this defendant at this time, before he is sent to jail, to raise this question. He should be given the opportunity to do it; it should not be denied to him. We don't send men to jail because their counsel don't raise questions on motions which have been conclusively, it would seem,

decided by the Court of Appeals of this circuit." (Emphasis supplied).

Some months later, the District Court handed down a decision which has a significant bearing on the "waiver" aspect of the case.

In *U.S.* v. *Shelton*, Crim. No. 825-62, in the Court below, Shelton, one of the six defendants whose convictions were reversed by this Court in *Russell*, *supra*, moved for dismissal of the new indictment found against him following *Russell*, because of denial of a speedy trial, asserting that because the government could have specified in the original indictment (found in May 1956) the subject under inquiry by the congressional committee, the government's failure so to do made all the time between that indictment and the new indictment "chargeable" to the Government. On December 19, 1962, Youngdahl, J., denied the motion, saying in his Memorandum that "the delay between the first indictment and the forthcoming trial of this case *under an indictment which meets constitutional requirements of specificity* is wholly attributable to the ordinary and necessary processes of justice." (Emphasis supplied).

Judge Youngdahl's ruling, absolving the government for delay in *Shelton*, is equally applicable to forestall any assertion here that petitioner's motion under Rule 12(b)(2) was not timely; for Judge Youngdahl said, in reference to the identical wording of the first indictment in *Shelton*:

> "Under the law as it then clearly existed in the District of Columbia, the wording of the indictment was completely proper; such wording was not declared improper until the Supreme Court decided this very case, sub nom. Russell, supra.

> That the wording of the first indictment reflected the then current rule in the District of Columbia was emphasized by the Supreme Court itself when that Court changed the rule, both in the majority opinion, 369 U.S. at 754, n. 7, and in the dissent, 369 U.S. at 782, n. 2. Moreover, if this then-current rule did permit the government any choice in the matter, it would have been proper for the government to resolve the choice in favor of simplicity, i.e., in favor of omitting an allegation of the specific subject under inquiry—under the simplified rules of criminal procedure. Thus this Court finds no fault on the part of the government in its choice of wording in the first indictment."

The Court then distinguished *Petition of Provoo*, 17 FRD. 187 (1955), aff'd *per curiam* 350 U.S. 857 (1955) saying that in wording the first indictment in *Shelton* "there is not the slightest bit of * * * negligence, or any other degree of fault on the part of the government. It is not even clear that a 'choice' was made at all. The government simply followed the law as it then existed." By the same token, no fault or negligence can be attributed to the petitioner in omitting to file a motion to dismiss such an indictment before the state of the law, climaxed by the jailing of Barenblatt, was changed by the decision of this Court in *Russell*.

It follows, we submit, that where the change in the law in *Russell* was applied retroactively to ten other cases, in justice the same treatment cannot be denied this petitioner where his counsel relied on the state of the law as it existed up to *Russell*, and then moved against the indictment in District Court as soon as that Court resumed jurisdiction of his case following the decision in *Russell*. In these circumstances denial

of relief from the "waiver" by the District Court was arbitrary and an abuse of discretion.

4. The government's contention in the court below that Criminal Rule 12(b)(2) provides no remedy for a convicted defendant following affirmance of his conviction and before his commitment under the judgment would leave an unfilled gap in the remedies provided by the law. Thus, even a jailed defendant, who has pleaded guilty, has a remedy, after *termination* of a proceeding, by collateral attack upon a conviction based on a fundamental defect in the indictment on which his conviction is based. 28 U.S.C. § 2255; *Martenay* v. *U.S.*, 216 F. 2d 760, cert. den. 348 U.S. 953.

Petitioner's construction of the Rule fills the remedial gap. The Court below apparently accepted it. It is consistent, too, with Criminal Rule 2, which provides:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

For the above reasons, petitioner submits the denial of his motion under Criminal Rule 12(b)(2) was reversible error.

POINT III

This Court in Denying Petitioner's Petition for Rehearing Did Not Pass on the Issues Here Raised so as to Preclude the District Court From Granting Petitioner's Motion Under Rule 12(b)(2), F.R. Crim. P.

The court below seriously misapprehended the scope of the issues argued to this Court in petitioner's petition for rehearing.

In its *per curiam* opinion the court below says (Appendix A, *post*): "with reference to Rule 12(b)(2), it appears that the issue made before the District Court, and now made here, was argued to the Supreme Court in appellant's petition for rehearing."

The above statement is inaccurate. The fact is that the petitioner argued only a *part* of Rule 12(b)(2) to this Court, namely the mandatory portion of the rule which appears to require either a trial or appellate court to dismiss an indictment *at any time during the pendency of the case* for failure to charge an offense. Petitioner did not argue to this Court the part of the rule which permits the trial court to entertain and grant a motion to dismiss an indictment, without regard to time limitations, "for cause shown."

Even if it could be said (and we think it cannot) that this Court in denying rehearing, passed upon the argument that the indictment, under the decision in *Russell*, fails to charge an offense, and determined that issue adversely to petitioner, this Court did not pass upon the other Rule 12(b)(2) issue presented in the courts below and now raised here, because that issue was not ripe and was never tendered.

As we have indicated, Rule 12(b)(2) contains two operative provisions. Petitioner invoked only one of

these provisions in this Court, but following remand, he invoked *both* of them in the District Court and in the court below. The two provisions are as follows:

> (a) "* * * failure of the indictment * * * to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

This provision, which is mandatory in terms, was invoked by the petitioner in this Court, in his petition for rehearing, on the basis of authorities which hold that such defense or objection is not subject to waiver and the provision is an operative in an appellate as in a trial court. *Marteney* v. *United States*, 216 Fed. 2d 760, *cert. den.* 348 U.S. 953.

> (b). "Failure to present any defense or objection (e.g. based on defects in the indictment other than that it fails to charge an offense) as herein provided (i.e. by motion before trial) constitutes a waiver thereof, but the court, for cause shown, may grant relief from the waiver." (Parenthetical matter added.)

Clearly this provision is intended to be operative in the District Court only. There is no authority for invoking it in an appellate court. Petitioner did not attempt to do so in his petition for rehearing in this Court. The petition itself provides demonstrative evidence of this fact.

Petitioner did, however, upon remand, invoke both provisions of Rule 12(b)(2) in the District Court and in the court below. The scope of the issues, therefore, is not the same at all on this petition as on the petition for rehearing in this Court. At that time the petitioner possessed a remedy in the District Court which was much broader in scope than the single mandatory

provision of Rule 12(b)(2) on which he was obliged to rely in this Court. Relief under that provision of Rule 12(b)(2) would have called for a determination that the indictment failed to charge an offense, a ruling which this Court was not required to make at that time, since the broader remedy of relief from the "waiver" for cause shown was still available to the petitioner in the District Court.

The court below, in its *per curiam* opinion, does not adopt the position argued for by the government, that the remedies provided by Rule 12(b)(2) are not available in the District Court under any circumstances, following affirmance on appeal. Rather that court held that relief on the merits under the Rule was precluded by this Court's denial of rehearing, upon the theory that the issue made in the District Court and now made here was argued in the Supreme Court in petitioner's petition for rehearing. But the facts are at odds with that theory. The present posture of the case is wholly different.

These important considerations further negative the giving of preclusive effect to this Court's action in denying rehearing:

(1) The government, in the courts below, treated *Russell* as if it only made a relatively minor change in the law of notice pleading in this area of the criminal law. We submit it has misread *Russell*, which in fact, goes far beyond that. It is a decision defining substantial constitutional rights which in effect says to the individual citizen who may be called before a Congressional committee: "You may not be indicted for contempt of Congress unless a group of your fellow citizens, a grand jury, votes that you must stand trial

for refusing to respond to questions upon a specific subject matter of inquiry which must be found *as a fact* by the grand jury; and you may not be convicted unless a second group of your fellow citizens, a petit jury, again passing upon the same subject matter of inquiry *as a question of fact*, shall determine you guilty." This, we submit, is the greater significance of *Russell*, which interposed the fuller protection of the grand and petit jury system between the individual citizen and possible arbitrary exercise of this Congressional inquisitorial power. In this aspect, the invalidity of the indictment is not simply a failure to give adequate notice, but entrenches on fundamental and constitutional rights. In *Russell* this Court was focusing its attention on a general investigation of judicial procedures in this important area, and making fundamental changes in the prior state of the law for the protection of constitutional rights of individuals.

(2) As we have seen, under Point II, at the time he applied to this Court for rehearing, petitioner had a remedy in the District Court by motion under Rule 12(b)(2), which he had not exhausted. This Court, of course, was aware of the availability of such a remedy. Thus, petitioner's petition to this Court to exercise its appellate powers in his behalf was premature. This is the only valid distinction between petitioner's situation and that in *Silber*. Although Silber had filed a pre-trial motion in the District Court (thus exhausting his remedy there), he had abandoned the point there and in the Court of Appeals and in this Court. And yet this Court reversed Silber's conviction on the very same day it denied petitioner's petition for rehearing. It also freed Grumman, who likewise had waived his motion in the District Court, and Hartman, who failed to raise the point on appeal.

(3) Finally, as we have indicated above, a motion under Rule 12(b)(2) in the District Court is broader in scope than was petitioner's petition for rehearing. The District Court motion could and did invoke both the mandatory and permissive provisions of Rule 12(b)(2), while the petition for rehearing invoked only the mandatory provision of the Rule. It follows, that the District Court could grant the motion without necessarily deciding, under the mandatory provision of Rule 12(b)(2), that the indictment fails to charge an offense. It was sufficient for the District Court to find that good cause was shown for entertaining the motion and dismissing the indictment. This Court, of course, upon review of the District Court's order, possesses the same latitude.

And so this Court, in denying rehearing, in effect relegated petitioner to his available but as yet unexhausted remedy in the District Court, and at the same time avoided an appellate ruling on an important question (i.e., did the defective indictment fail to charge an offense) not then necessarily requiring Supreme Court decision.

POINT IV

The District Court's Failure to Act on the Motion to Reduce Sentence Within Sixty Days From the Transmission of the Mandate of Affirmance Did Not Oust the Jurisdiction of That Court to Rule on the Motion Under Rule 35

The motion under Criminal Rule 35 sought alternative relief limited to the sentence imposed, a matter as to which, of course, this Court did not pass when it affirmed the conviction.

The motion urged the District Court to suspend the jail sentence and place the petitioner on conditional probation.

The motion was initially set to be heard on July 20, 1962, but, as indicated, *supra*, by virtue of the administration of the Courts' business, and not at the instance of the petitioner, the motion was not heard until February 1, 1963.

As previously stated, when the motion under Criminal Rule 35 came on for hearing before the District Court on February 1, 1963, the government contended the District Court had lost jurisdiction to rule on it, because, although the motion was admittedly filed on time, the court had not acted upon it within 60 days after July 19, 1962, which the government contended (and petitioner denied) was a requirement under Rule 35, F.R. Crim. P. This contention was argued before Judge Pine and he overruled it. Government counsel conceded on the argument that the contention was not based on any ruling authority, but cited language in a case involving late *filing* of a notice of appeal, i.e., *U.S.* v. *Robinson*, 361 U.S. 220 (1960). He also conceded he was contending for a harsh rule, since he was relying on failure of the *Court* to *act*, not on any delay or omission by petitioner or his counsel.

Petitioner's position is that, the motion having been filed in due time, the jurisdiction and power of the court to act on it attached [illegible] continued to exist until the court disposed of the motion.

No reported decision in which the question has previously been raised by the government has been found, perhaps not surprisingly in view of the admitted harshness of the result to a convicted defendant.

Dicta indicate, however, that the 60-day limitation is regarded by the Courts (as it undoubtedly was by Judge Curran in the instant case), and as Judge Pine

ruled, as applying to a *party's time to file* a motion, not to *the court's time for hearing and decision.* Thus in *United States* v. *Chicago Professional Schools, Inc.*, 302 F. 2d 549 (1962), (a case involving a late *filing*), the United States Court of Appeals for the Seventh Circuit, after reviewing the proceedings, said:

> "We are forced to conclude that by none of the proceedings in this court was *the time fixed by rule 35 tolled for the filing of defendants' application for reduction of sentence under rule 35*, and that therefore the district court did not err in entering the judgment from which defendants have appealed." (Emphasis supplied).

And in *Johnson* v. *United States*, 235 F. 2d 459 (also a case of late *filing*), the Court said:

> "We do not agree * * * that the petition for certiorari without a stay of mandate prevented the petitioner from applying to the district judge for a reduction of sentence *within the sixty days from the receipt of the mandate, for which the rule provides* * * *, within sixty days after notice of denial of the writ has been given to those provided for in the rule, *petitioner had the right to apply* and * * * it was incumbent upon him *to make his application for the reduction within that time.*" (p. 461). (Emphasis supplied).

By referring the Motion to Reduce Sentence to the Assignment Commissioner, Judge Curran in effect ruled that his failure to act on it had not deprived the court of jurisdiction, and applied a construction we believe is the correct and reasonable one, namely, that the running of the 60-day period was tolled by the timely filing of defendant's motion, and by the stays granted, incident thereto. Hence, we submit, Judge Pine's ruling was correct.

POINT V

The District Court Was in Error in the Exercise of Its Discretion in Refusing to Consider Circumstances in Mitigation of the Sentence

Upon the merits of the motion, a principal ground urged in its support in the court below was the obvious injustice of jailing the defendant upon a fatally defective indictment, when nine others similarly situated were freed; and petitioner urged that, all else failing, the court should take into account, in mitigation of the penalty, and to weigh, in exercising his discretion, the facts with respect to that matter. The District Court, however, refused to consider and weigh these facts on that motion, asserting that petitioner's sole and only relief was by way of a reversal of his conviction (24, 25). The District Court erred in taking this position. The Court should have weighed these facts in mitigation in exercising its discretion, but expressly refused to do so. We do not question the fact that reduction of sentence is a matter within the discretion of the District Court. But where, as here, the Court expressly refused to weigh facts and considerations relevant to an appropriate exercise of its discretion, error is committed, and the remedy lies in a reversal of the judgment and remand to the District Court under proper instructions.

Normally, of course, the exercise of the trial court's discretion will not be disturbed on appeal, but it must be a judicial discretion and not an "arbitrary" discretion" and it becomes "arbitrary" if exercised for an erroneous reason. *National Ben. Life Ins. Co. v. Shaw-Walker Co.*, 71 App. D.C. 276, 111 F. 2d 497, cert. den. 615 Ct. 35, 311 U.S. 673, 85 L. Ed. 432 (1940).

CONCLUSION

The *per curiam* opinion of the court below (Appendix A) concludes with the statement:

> "If we are in error in our interpretation of the Supreme Court's action on the application for rehearing, our error can be corrected by that Court."

This case is indistinguishable in substance from *Russell*; *Grumman*, *Silber* and *Hartman*, but the question here presented goes even beyond the issue decided in those cases. It concerns the degree of fairness in the judicial process.

The ultimate question presented here is whether petitioner should be jailed where ten others are freed, or whether there will be equal justice for all.

For the foregoing reasons, this petition should be granted and the case remanded to the District Court with appropriate instructions.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,687

MAURICE A. HUTCHESON, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the District of Columbia

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Decided June 27, 1963

Mr. Joseph P. Tumulty, Jr. for appellant.

Mr. William H. Willcox, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, and *Frank Q. Nebeker* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

PER CURIAM: Appellant here is a victim of the time-honored rule that ordinarily an issue not properly raised in the trial court is not available on appeal as the basis for a claim of reversible error. Hutcheson was convicted of contempt[1] of Congress for refusal to answer questions put to him by the Senate Select Committee on Improper Activities in the Labor or Management Field. In refusing to answer, appellant disclaimed his privilege against

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[1] 52 Stat. 942, 2 U.S.C. § 192.

self-incrimination. His conviction was affirmed by this court[2] and the Supreme Court.[3]

On May 21, 1962, one week after the affirmance by the Supreme Court, that Court reversed six other contempt of Congress cases[4] because the indictments failed specifically to state the subject under inquiry, a vice which is conceded to be present in appellant's indictment. In the *Russell* cases, however, pre-trial objections were made to the indictments on this ground and were re-urged before this court and the Supreme Court.[5] Appellant raised the issue for the first time on application for rehearing before the Supreme Court. The application for rehearing was denied without dissent.[6] Appellant then filed two motions in the District Court, one to reduce sentence under Rule 35 and the other under Rule 12(b)(2), F.R. Crim. P., "to vacate the judgment and set aside the sentence * * * and to dismiss the indictment." Both motions were denied, and appellant appeals.

Without deciding, as the Government argues,[7] that the District Court's failure to act on the motion to reduce sentence within sixty days from the transmission of the mandate of affirmance ousts the jurisdiction of that court under Rule 35, and without deciding under what circumstances, if any,[8] the District Court's denial of such motion is reviewable by this court, we hold that, in any event, no abuse of discretion in denying the motion is shown.

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[2] *Hutcheson* v. *United States*, 109 U.S. App. D.C. 200, 285 F. 2d 280 (1960).

[3] *Hutcheson* v. *United States*, 369 U.S. 599 (1962).

[4] *Russell* v. *United States*, 369 U.S. 749 (1962).

[5] See *Russell* v. *United States*, *supra*, Note 4, 752-753.

[6] *Hutcheson* v. *United States*, 370 U.S. 965 (1962).

[7] Citing *United States* v. *Robinson*, 361 U.S. 220 (1960).

[8] See *Bryson* v. *United States*, 9 Cir., 265 F. 2d 9, 14 (1959).

With reference to Rule 12(b)(2), it appears that the issue made before the District Court, and now made here, was argued to the Supreme Court in appellant's petition for rehearing. The Supreme Court passed on that issue[2] when it denied that petition. As far as this court is concerned, there the matter ends. If we are in error in our interpretation of the Supreme Court's action on the application for rehearing, our error can be corrected by that Court.

Affirmed.

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[2] Compare *Silber* v. *United States*, 370 U.S. 717 (1962). See also *Zap* v. *United States*, 330 U.S. 800 (1946), 329 U.S. 824 (1946), 328 U.S. 624 (1946).

APPENDIX B

(Filed June 13, 1962)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 447 Misc.

LOUIS HARTMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

Motion for Leave to File Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To The Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner moves that permission be granted to file the attached Supplement to the Petition for Writ of Certiorari on the grounds that the decision of this Court in *Russell v. United States*, O. T. 1961, Nos. 8, 9, 10, 11, 12 and 128, raises additional issues in the instant case which should be considered with the pending Petition for Writ of Certiorari, to wit, whether the indictment returned by the grand jury against the petitioner was fatally defective in that it failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated and whether the questions which were the basis of the indictment were pertinent to that subject.

WHEREFORE, the petitioner herewith moves for an order that the attached Supplement to the Petition for Writ of Certiorari in the above entitled case be filed and con-

sidered a part of the original Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 447 Misc.

LOUIS HARTMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

Supplement to Petition for Writ of Certiorari

Was the Indictment Invalid under Russell v. United States, O. T. 1961, in Failing to Identify the Subject under Congressional Inquiry and How the Questions asked the Witness Were Pertinent to That Subject?

In this case, as in the cases of *Russell* v. *United States*, O.T. 1961, No. 8, *Shelton* v. *United States*, O.T. 1961, No. 9, *Whitman* v. *United States*, O.T. 1961, No. 10, *Liveright* v. *United States*, O.T. 1961, No. 11, *Price* v. *United States*, O.T. 1961, No. 12, *Gojack* v. *United States*, O.T. 1961, No.

128, the petitioner was charged with having refused, in violation of 2 U.S.C. 192, to answer certain questions put to him by a congressional subcommittee. In this case, it was a subcommittee of the Committee on Un-American Activities of the House of Representatives.

In *Russell* v. *United States*, *supra*, and the other cases decided that day, the indictments were practically identical, stating that the questions to which answers were refused "were pertinent to the *question* then under inquiry" by the subcommittee. In this case, the indictment alleged there was a refusal to answer questions "pertinent to the *matter* under inquiry". We draw no distinction between the use of the word "matter" as compared to the word "question", since they apparently were intended to have the same meaning in the context in which they were used. See also *Sinclair* v. *United States*, 279 U.S. 263 at 292. However, it should be pointed out that, at least in *Russell*, the words "pertinent to the question under inquiry" are the exact words in 2 U.S.C. § 192. Therefore, the indictment in the instant case is, at the very least, less exact than the indictments in *Russell*, which the Court held to be fatally defective in its decision on May 21, 1962, U. S. Constitution Amend. V, Rule 7(c) Fed. R. Crim. Proc., *United States* v. *Cruikshank*, 92 U.S. 542.

If that be true, then it would appear equally true that notice of the invalidity of the indictment and its failure to charge an offense should be considered by this Court under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, which provides in part—"Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noted by the court at any time during the pendency of the proceeding."

As was pointed out in *Russell*, not even a bill of particulars could save the indictment in that case since it was fatally defective. See *United States* v. *Norris*, 281 U.S. 619, 622.

For these reasons, the Petition for Writ of Certiorari should be granted and the case remanded back to the District Court in light of *United States v. Russell, supra.*

Respectfully submitted,

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